

# EXHIBIT A

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Argument

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

STORM LLC,

Plaintiff,

v.

06 CV 13157 (GEL)

TELENOR MOBILE COMMUNICATIONS,  
AS,

Defendant.

-----X

New York, N.Y.  
November 22, 2006  
10:45 a.m.

Before:

HON. GERARD E. LYNCH,

District Judge

APPEARANCES

LOVELLS LAW FIRM  
Attorneys for Plaintiff  
PIETER VAN TOL  
GONZALO S. ZEBALLOS

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TELENOR MOBILE COMMUNICATIONS, AS  
Attorneys for Defendant  
BJORN HOGSTAD

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1 (In open court; case called)

2 THE DEPUTY CLERK: Matter of Storm LLC v. Telenor  
3 Mobile Communications. Counsel, please identified yourselves  
4 for the record.

5 MR. VAN TOL: Good morning, your Honor. Pieter  
6 Van Tol of Lovells for Storm LLC. I am joined by my colleague  
7 Gonzalo Zeballos from Lovells.

8 THE COURT: Good morning, gentlemen.

9 MR. SILLS: Good morning, your Honor. Robert Sills of  
10 Orrick, Herrington & Sutcliffe on behalf of defendant Telenor  
11 Mobile Communications. With me are my colleagues Peter  
12 O'Driscoll, Karen Thompson, and Alison Swap.

13 Also in the courtroom, your Honor, is Bjorn Hogstad,  
14 the region attorney who works at Telenor, observing these  
15 proceedings.

16 THE COURT: Okay. Good morning to all. Since we were  
17 here last week, I have carefully read all of the written  
18 submissions of the parties. And while I can't claim to have  
19 read every word of all of the exhibits submitted in support of  
20 those papers, I have delved fairly deeply into the substantive  
21 record of the case. So I have, I think, come to a pretty clear  
22 understanding of the issues in the case, and largely prepared  
23 to rule.

24 Now, I note two things in that regard.

25 Number one, the plaintiffs, as I believe we had

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1 discussed at our last meeting, did not submit reply papers, and  
2 so I think it's fair to give them an opportunity to make any  
3 additional points in response to things asserted in the  
4 defendant's arguments.

5 And then secondly, I see that Mr. Van Tol has come  
6 prepared not only to argue, but with a chart, which I can see  
7 and have already read as we were waiting to begin today. And I  
8 think it actually is a very clear and effective summary of the  
9 points that I already understand the plaintiffs to be making.

10 So while I don't want to foreclose anything the  
11 plaintiffs think is important to say in response, the one thing  
12 that I would be particularly interested to hear, if the  
13 plaintiffs have something to say about it, is the defendant's  
14 argument that I, in effect, don't have jurisdiction to hear the  
15 plaintiff's action and request for an injunction because the  
16 arbitrable tribunal's ruling was interlocutory in nature.

17 The points on the merits I think are ones that were  
18 very effectively made in the plaintiff's opening and brief.  
19 And at least reviewing the chart that's before me, it seems to  
20 me that I do understand those points, and I think they were  
21 already made, and there was understandably not extensive or any  
22 attention given to the jurisdictional point in the plaintiff's  
23 initial submission.

24 And the defendant's discussion of the point was  
25 notably brief; and, of course, all I can do is evaluate it on

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1 its merits. The fact that it was brief, it could mean that it  
2 was so straightforward, simple, and convincing a point that  
3 there was nothing more to be said; or it could mean the  
4 defendant was relying more on other arguments and was putting  
5 that one forward more tentatively. You can't draw any  
6 inference from its brevity other than with defendants  
7 submitting one paragraph effectively and one or two citations,  
8 and the plaintiffs saying nothing, I'm not as sure that I do  
9 understand the competing arguments on this front.

10 So without foreclosing the plaintiffs from saying  
11 anything that they think is important in rebuttal, I would be  
12 particularly interested in hearing their response to the one  
13 point that, as far as I can see, and maybe I missed something,  
14 they had not yet responded to.

15 So, Mr. Van Tol, the floor is yours.

16 MR. VAN TOL: Thank you, your Honor. And on the  
17 demonstrative, I won't go through point-by-point, I will merely  
18 use it to frame our response to Telenor's arguments. But I  
19 will, as your Honor suggested, pick up at the jurisdictional  
20 point.

21 The case that Telenor cites is the Michaels case.  
22 With just a bit of scrutiny, it becomes clear that Michaels is  
23 inapposite here. In the Michaels case, the arbitrators decided  
24 five of six counterclaims in their award, but they defer the  
25 other counterclaim, as well as any determination on the ones

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1 they did decide as far as damages for a later time. So it's  
2 clear in Michaels that the award required further action of the  
3 issues that were decided.

4 And the Second Circuit in a case called  
5 Metallgesellschaft, which I'm sure I butchered in German,  
6 speaks to that. So I have a copy for Mr. Sills, and I also  
7 have a copy for your Honor if you would like it.

8 THE COURT: Why don't you tell me what it says with  
9 respect to the jurisdictional point. And let me be try to be  
10 as focused as I can.

11 It seems to me that the Michaels case is potentially  
12 distinguishable, essentially, as you suggest. In that case,  
13 the ruling was a partial resolution of the claims; that is,  
14 there were, as you say, a number of claims; some of them were  
15 decided, some of them remain to be decided. And it certainly  
16 makes a lot of sense to say that we shouldn't address those  
17 issues in court piecemeal, but should wait until there's a  
18 final resolution of all the claims.

19 And one might argue that a jurisdictional ruling is  
20 something else; again, that it has a different nature; and that  
21 it might be more important or more efficient or something to  
22 take that up at an earlier stage.

23 But if we were talking, for example, about the  
24 jurisdiction of the Court of Appeals over a ruling that I might  
25 make, or of my jurisdiction over appeals from the bankruptcy

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1 court, it's clear, is it not, that a ruling denying a motion to  
2 dismiss for lack of jurisdiction in those contexts would be  
3 considered an interlocutory order.

4 And so I guess the larger point or the more general  
5 point I'd wonder about is to what extent is that a valid  
6 analogy or are there considerations with respect to arbitration  
7 different, and it's not an appeal, it's a different kind of  
8 animal when you've come to the Court in this context.

9 And more specifically, does the Metallgesellschaft  
10 case or anything else specifically address that kind of  
11 distinction? And do you have some precedent where the courts  
12 have accepted an action of this sort where the plaintiff comes  
13 in seeking, in effect, review of a jurisdictional decision of  
14 the arbitrator?

15 MR. VAN TOL: I'll start with your last question  
16 first, your Honor. I searched high and low, and I'd be happy  
17 if Mr. Sills found one, I did not find a case dealing with  
18 jurisdiction specifically.

19 THE COURT: Okay. We didn't, either, so that's okay.

20 MR. VAN TOL: At least I did something right, your  
21 Honor. But I think the Metallgesellschaft case does help,  
22 because it's not quite the situation that your Honor posed  
23 where there's an appeal. Instead, Metallgesellschaft was a  
24 request to confirm an award. And what the Court said, this is  
25 on page 283 of the reported decision, page 3 of the Westlaw

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1 printout, it, first of all, distinguished Michaels by saying in  
2 Michaels it didn't finally dispose of the claims, and we  
3 already talked about that. But then it sets forth the  
4 standard, which is important, your Honor, in the next  
5 paragraph.

6 It says, An award which finally and definitely  
7 disposes of a separate independent claim may be confirmed,  
8 although it does not dispose of all the claims that were  
9 submitted to the arbitration.

10 THE COURT: But that's not the case here. We haven't  
11 had a final disposition of any claim; we've only had, again,  
12 what in the context of the courts would be a clearly  
13 interlocutory ruling along the way to resolving the claims.

14 MR. VAN TOL: The key though, your Honor, is what the  
15 courts look at is, is there anything else that the arbitrators  
16 would have to do on that issue. And here, there isn't.

17 THE COURT: Well, but "on that issue" is very  
18 different than "on that claim." There's nothing more they have  
19 to do to decide jurisdiction. That much is so. But you could  
20 make that argument with respect to any interlocutory order at  
21 all. If the arbitrable tribunal says, We're going to hear this  
22 evidence; we're not going to exclude it. That's a final ruling  
23 about that issue. They're not going to revisit that later on.  
24 Maybe different kinds of evidentiary rulings. They could say,  
25 We're not going to revisit it. It's done. We're hearing it.



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1 That issue is finally and authoritatively resolved. But that's  
2 the very essence of interlocutory rulings.

3 MR. VAN TOL: In this case, your Honor, and I do have  
4 another argument, and I don't want to be seen as moving too  
5 quickly to it, because I think they intersect.

6 The difference here is this isn't just a  
7 jurisdictional ruling or a ruling where we then go forward. We  
8 are also asking here for a permanent injunction, a stay.

9 Under the FAA, we are allowed to come into court to  
10 your Honor, even if we're not moving to vacate the award, and  
11 say, your Honor, stop this case in its tracks. We are not a  
12 proper signatory to the contract; therefore, we want you to  
13 issue a stay.

14 So there is an alternative grounds for your Honor to  
15 hear this case. And I would urge that on you if you were at  
16 all concerned that the award might not be final.

17 THE COURT: Let me address that. And here, I do think  
18 we might be on slightly different grounds, because I'm not sure  
19 that this is about jurisdiction. It might be about a more  
20 prudential kind of consideration.

21 Of course, you could have come to court up-front and  
22 said, We object to this arbitration. We don't want to be in  
23 this arbitration and join this arbitration. They've served us  
24 notice, and this is just not an arbitrable claim.

25 And, alternatively, I suppose that there's no waiver

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1 if you state your objection to the arbitration panel, lose, and  
2 then go forward and come here at the end and say, Don't confirm  
3 this award; vacate it, because there's no jurisdiction.

4 But once you go to the arbitrable panel and make your  
5 arguments to them and lose there, whether or not there's  
6 jurisdiction here, is it sensible for a court to hear piecemeal  
7 that, in effect, appeal from the arbitrator's judgment?  
8 Because what you're doing is taking several preliminary bites  
9 of the apple in a way that very much interferes with the  
10 efficiency of arbitration proceedings.

11 It's one thing to say, We don't want to be there.  
12 It's a different thing to say at the end that their decisions  
13 are wrong on any number of issues. But to sort of go halfway  
14 down the path and then interrupt to come to court strikes me as  
15 getting the worst the of both worlds.

16 And, again, maybe this is a subset of the kind of case  
17 that we already said none of us could find, but is there any  
18 precedent that addresses this sort of in medias res request for  
19 a stay?

20 MR. VAN TOL: Not that I've seen, your Honor. This is  
21 an unusual case because of the UNCITRAL rules. And as I said  
22 at our earlier hearing, the reason we went to the tribunal is  
23 because the UNCITRAL rules, which are incorporated in the  
24 agreement, quite clearly say to Storm the tribunal may hear  
25 jurisdictional objections. We agree with that.

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1 Our argument to the tribunal was in hearing our  
2 objection, you must apply this Sphere Drake standard.

3 THE COURT: Is there anything in the UNCITRAL rules  
4 that say you can't go to court and raise the issue first?

5 MR. VAN TOL: Well, your Honor, I would be afraid that  
6 I would then be in breach of the arbitration agreement. The  
7 principle that the UNCITRAL rules incorporates is an arbitrable  
8 principle called competence-competence, which means that the  
9 arbitration tribunal may rule first, and then the party who  
10 wins or loses may go to the applicable court and say they were  
11 right or they weren't right about whether or not there's  
12 jurisdiction.

13 So while there's not a case on it, this happens in the  
14 arbitrable context all the time. And the distinction here is  
15 even if there were no award by the arbitration tribunal, say we  
16 went there, we made our arguments, and they said, We're going  
17 to defer and you go to arbitration, I could come into court  
18 under the FAA, file a motion to stay the arbitration, and argue  
19 to your Honor that Sphere Drake says this needs to be heard by  
20 a judge and not an arbitration tribunal. And that gives us  
21 full jurisdiction; it gives your Honor full power to review our  
22 submission. So we don't need to decide whether the award is  
23 interlocutory or final; we have a freestanding basis to be  
24 here.

25 THE COURT: Okay. When you say that happens all the

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1 time, but there's no case on it, of course such things -- there  
2 are many such things, they happen all the time, and it's so  
3 obvious that they are allowed to happen, that nobody challenges  
4 them and, therefore, there's no case law.

5 But are you representing to me you're saying that  
6 there are many cases in which courts have ruled on  
7 jurisdictional issues after the arbitration panel has either  
8 decided them or deferred them, but while the arbitration is in  
9 process, and enjoined the further proceeding of the  
10 arbitration?

11 MR. VAN TOL: Yes, your Honor. I'm aware of foreign  
12 cases. Remember, these UNCITRAL cases are often foreign. And  
13 Mr. Sills, I know, is much more adept at this than I. There is  
14 a French version of competence-competence, a German one. So it  
15 becomes an ongoing debate in the international arbitration  
16 community as to what happens when you go and ask the tribunal  
17 whether they have jurisdiction and they say yea or nay what to  
18 do then.

19 And there's a stream of cases that say you may go to  
20 court and get an adjudication, and those are the ones I'm  
21 referring to, your Honor. And that's where we are today,  
22 because we are trying to invoke the Sphere Drake standard.

23 I don't need an arbitrable award ignoring Sphere Drake  
24 to come to your Honor and say, Your Honor, we're in the wrong  
25 place. We need to be in court.

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1 THE COURT: Okay. Mr. Sills, maybe I should hear from  
2 you briefly about that issue of jurisdiction. I don't need to  
3 hear more about whether this was or wasn't a final award. I  
4 think it clearly is not. I think it's clearly an interlocutory  
5 ruling. But Mr. Van Tol has now suggested a somewhat different  
6 argument, and I'm not sure the extent to which it's just trying  
7 to say the same thing in different words.

8 But it does seem to me that this is not quite the same  
9 thing as taking an appeal within a court system from an  
10 interlocutory ruling. He is coming here seeking an injunction  
11 against an arbitration. And one that I think is clear, maybe  
12 you'll have a different view, but I would have thought it's  
13 clear that he could have come here with exactly this action  
14 before the arbitration started, as soon as they got the notice.  
15 I would have thought it clear that the plaintiff could have  
16 come and brought essentially this same action to this Court.

17 So I guess one question is am I right about that? And  
18 then the second is if I am, then why is it different because  
19 the arbitrators have spoken their piece on the same subject  
20 matter?

21 MR. SILLS: Well, your Honor, I think the plaintiff  
22 is, to some extent, shifting ground here. And the petition is  
23 framed as a petition to vacate. And I think as to that, the  
24 Michaels case is absolutely clear. I know your Honor reviewed  
25 the case, and I don't want to burden the record by reading from

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1 it, but that requires a final determination on claims. And  
2 there, I think the Court of Appeals analogy would be a 54(b)  
3 certificate. It's perfectly possible to decide a separate and  
4 independent claim. And that is, in fact, the language that  
5 appears in the arbitration cases. And this isn't that.

6 THE COURT: Right. And that's the language in the  
7 Metallgesellschaft case also.

8 MR. SILLS: Precisely, your Honor. And very close  
9 analogy to the way in which interlocutory orders of this Court  
10 are or are not appealable to the Court of Appeals, an almost  
11 identical practice has grown up in terms of seeking  
12 interlocutory review of arbitrable decisions by this Court and  
13 I suppose it's not surprising, given who's devised this set of  
14 rules.

15 THE COURT: Okay. So he's shifting ground. And maybe  
16 the form is critical that the action is a petition to vacate.  
17 But I suppose that doesn't really get us very far, because I  
18 guess then you could come back tomorrow, if the problem is he  
19 didn't style it right, he can come back tomorrow with a  
20 different action that is styled a lawsuit to enjoin  
21 arbitration, and then where are we?

22 MR. VAN TOL: Your Honor?

23 THE COURT: I'm sorry.

24 MR. VAN TOL: I am loathed to interrupt, but in the  
25 free declaration, Exhibit A is our petition, and it's styled as

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1 a petition for vacatur and injunction where we cite 9 U.S.C.,  
2 Section 4. So that shouldn't be an issue, your Honor.

3 MR. SILLS: Your Honor, I don't dispute that. From  
4 the day we filed our demand for arbitration, they could have  
5 come into court seeking to vacate it. The party always has the  
6 right under the Arbitration Act to come in and seek an  
7 injunction against arbitration.

8 Now, whether it's seen as jurisdictional or not,  
9 "jurisdiction" has a bit of a funny meaning in this context,  
10 the fact is, as your Honor says, that's not what they did.  
11 They went forward, and as we've documented and as the record  
12 documents very extensively, conceded jurisdiction on the part  
13 of the arbitrator, went ahead and argued this jurisdiction  
14 motion and lost.

15 THE COURT: Let me be clear about what we're saying.  
16 They conceded, am I right, that the arbitrators had  
17 jurisdiction to decide the jurisdictional question; they didn't  
18 concede the merits that the -- they are vigorously arguing that  
19 the arbitrators -- that this was not an arbitrable claim.

20 MR. SILLS: That's true, your Honor. But it seems to  
21 me, having conceded jurisdiction, and I don't think the record  
22 would be any clearer on that, that you're not allowed to say, I  
23 concede jurisdiction, but only on condition that I went. If  
24 there's a jurisdictional concession, and you're prepared -- and  
25 I don't dispute, your Honor, that at the end of this case,

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1 which will hopefully come someday, when there's a final award,  
2 assuming that it grants us the relief we seek, that all of  
3 their claims, including their claim that there was no  
4 jurisdiction in the first instance, are brought up for review,  
5 just as if your Honor denies a motion to dismiss for, say, lack  
6 of personal jurisdiction, and goes ahead and decides the case.  
7 That's preserved for review before the Court of Appeals.

8 And so I suppose that in some highly theoretical sense  
9 they're seeking the analogy of an antisuit injunction. And in  
10 the sense in which we use the term "jurisdiction" in court,  
11 there is jurisdiction in the sense that there is judicial power  
12 to exercise equitable jurisdiction and halt the arbitration.  
13 And in that sense, I don't think Michaels is dispositive,  
14 because you always have the right to come to this Court and  
15 seek an injunction, I suppose, against almost anything. And  
16 it's not jurisdictional in the sense now, I think.

17 THE COURT: Yes.

18 MR. SILLS: I mean there are obvious defenses in terms  
19 of laches and waiver and the underlying merits, but putting  
20 those to one side --

21 THE COURT: Well, but this has some consequences for  
22 both sides, if I'm hearing you right. Because one of the --  
23 you just said, and I think it is correct as an abstract  
24 statement, that if I were to say, Get out of here. I don't  
25 have jurisdiction. I shouldn't consider the merits of this for



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1 whatever reason, and bar the door at the threshold, then it  
2 certainly would be clear that the plaintiff would have the  
3 ability to raise this jurisdictional objection, for want of a  
4 better word, the objection to the arbitrability of these claims  
5 or the objection to the validity of the arbitration agreement,  
6 in an effort to vacate any award that you ultimately receive.

7 But what happens if I say, Gee, Mr. Sills just said  
8 that the Michaels case is not really dispositive; and maybe as  
9 a matter of equitable discretion I shouldn't grant the relief  
10 of the plaintiff's request; but since that's only a prudential  
11 consideration, I think that since the issues have been  
12 presented on the merits to me already, I can go ahead and deny  
13 the plaintiff's arguments on the merits? Would that then be  
14 something that would be res judicata or would otherwise estop  
15 the plaintiffs from making an argument down the road to me or  
16 to somebody else that there was no jurisdiction on the part of  
17 the arbitration tribunal when and if you win in the  
18 arbitration?

19 MR. SILLS: The answer, your Honor, I think, is yes.  
20 You get one bite of the apple in court. They could obviously  
21 take an appeal. But I think your Honor --

22 THE COURT: Mr. Van Tol, are you sure you want to  
23 proceed with this action here now at this moment before me?

24 MR. VAN TOL: Yes, your Honor. The preliminary  
25 injunction rules state that the findings that your Honor makes

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1 for preliminary injunction --

2 THE COURT: Is only a preliminary injunction.

3 MR. VAN TOL: Yes, your Honor.

4 THE COURT: Of course, then what happens after the  
5 preliminary injunction gets denied, assuming it gets denied?  
6 What do we do with this action? Your request so far is for a  
7 preliminary injunction. But then after that, there's still an  
8 action pending for a permanent injunction. We could proceed  
9 and deal with that then in due course, as well. I guess that's  
10 just something that we have to decide if, as, and when we see  
11 how the preliminary injunction goes.

12 MR. VAN TOL: Yes, your Honor. And that was my  
13 suggestion. I don't know about timing, but if your Honor were  
14 to deny the preliminary injunction today, I don't think there  
15 would be time for you to really rule on our request to vacate  
16 and for a permanent injunction, which is really why we're here  
17 asking for a PI.

18 THE COURT: That's why it's so important to do this  
19 fast. But if it doesn't succeed, then there may be nothing  
20 left of the action to be ruled on on its ultimate merits,  
21 because absent a preliminary injunction, there wouldn't be much  
22 point in proceeding to address the permanent injunction issue.

23 MR. VAN TOL: Well, your Honor, then I guess if you  
24 deny the preliminary injunction and we go forward on the 7th  
25 and the 8th, and assuming for purposes of argument that we

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1 don't prevail, we would come to your Honor and say, Please  
2 vacate whatever you decided on the preliminary injunction was  
3 for those purposes only.

4 THE COURT: Right. So that presumably would not, in  
5 fact, estop you, because it's a preliminary ruling. And the  
6 only thing I have to decide now is whether you meet the  
7 standard for a preliminary injunction, not whether the  
8 arbitration panel does or does not have authority to hear this  
9 as a matter of law. That decision could only be made  
10 authoritatively either in this action, if there were time, or  
11 after the fact.

12 And I suppose there's no doubt that one way or the  
13 other this comes back before me, because even assuming that  
14 this action, as it currently exists, were to evaporate before  
15 the arbitration under the rules for the division of business,  
16 any subsequent action addressed to the merits of whatever the  
17 arbitration panel decides would come back to me anyway.

18 MR. VAN TOL: And, your Honor, that's why what we're  
19 suggesting is really a way to do this even more efficiently.  
20 In other words, I've said this before, there is no reason,  
21 absent the arbitrator's schedule, and I'm not trying to be too  
22 cavalier about that, but there is no reason to go forward on  
23 December 7th and December 8th and not give your Honor time to  
24 decide our petition for vacatur and injunction. If you put it  
25 off for a short time, Telenor has made no showing whatsoever of

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1 any financial harm, they've stated it, and I'll give your Honor  
2 evidence that's not occurring. There is no harm to a couple  
3 weeks' adjournment while your Honor decides these very tough  
4 issues.

5 This case in many ways is sui generis, and it's hard  
6 to get done. And there's no reason to go forward on December  
7 7th or 8th that I've heard from Telenor Mobile.

8 MR. SILLS: Your Honor, I can address that, but I  
9 don't think there's any need to.

10 THE COURT: I don't think there's any need to do that  
11 at this point. In fact, I think I'm prepared to rule, because  
12 the jurisdictional issue was the only one that I think I had  
13 not adequate argument on before, and I think this has been very  
14 useful in clarifying that issue.

15 Petitioner Storm LLC seeks a preliminary injunction  
16 prohibiting the further prosecution of an arbitration between  
17 itself and respondent Telenor Mobile Communications AS, pending  
18 the Court's resolution of Storm's application for an order that  
19 would, one, vacate the arbitration tribunal's October 22nd,  
20 2006 award; and, two, permanently enjoin the parties from  
21 proceeding with the arbitration. The motion will be denied.

22 In the first place, the Court agrees with Telenor that  
23 to the extent that plaintiff seeks vacation of the order styled  
24 "Partial Final Award Regarding Jurisdiction," the order is not  
25 subject to review by this Court because it is an interlocutory

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1 order. As the Second Circuit held in *Michaels v. Mariforum*  
2 *Shipping S.A.*, 624 F.2d 411 (1980):

3 "Under the Federal Arbitration Act, a district court  
4 does not have the power to review an interlocutory ruling by an  
5 arbitration panel. The language of the act is unambiguous. It  
6 is only after an award has been made by the arbitrators that a  
7 party can seek to attack any of the arbitrators' determinations  
8 in court by moving either to vacate the award or to modify or  
9 correct it. Where, as here, arbitrators make an interim ruling  
10 that does not purport to resolve finally the issues submitted  
11 to them, judicial review is unavailable."

12 That's 624 F.2d at page 414, citations and footnote  
13 omitted.

14 Though the Court in *Michaels* relied on Chapter 1 of  
15 the Federal Arbitration Act in making this statement, that  
16 chapter applies to actions and proceedings brought under  
17 Chapter 2, which enforces the convention on the recognition and  
18 enforcement of foreign arbitrable awards, except where Chapter  
19 1 conflicts with Chapter 2 or with the convention itself. See  
20 9 U.S.C., Section 208. There is no conflict here.

21 Moreover, the policy considerations supporting the bar  
22 on interlocutory appeals apply with equal force to arbitration  
23 under the convention. See *Michaels*, 624 F.2d at 414, noting  
24 that, "most of the advantages inherent in arbitration are  
25 dissipated by interlocutory appeals to a district court."

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1           There is no question that the award at issue here was  
2 not final. To be final, an arbitration award "must resolve all  
3 the issues submitted to arbitration; and it must resolve them  
4 definitively enough so that the rights and obligations of the  
5 two parties with respect to the issues submitted do not stand  
6 in need of further adjudication." The quotation is from Rocket  
7 Jewelry Box, Incorporated v. Noble Gift Packaging Incorporated,  
8 157 F.3d 174 at 176, (2d Cir. 1998).

9           Here, the tribunal merely denied a motion to dismiss.  
10 It did not resolve all the issues submitted to it. Storm does  
11 not even attempt to argue the contrary, and it would not make  
12 sense to do so, given that Storm's motion to enjoin the  
13 arbitration proceedings from continuing is predicated on the  
14 very fact that those proceedings have not been completed.  
15 Storm relies on the case of Metallgesellschaft, A.G. v.  
16 Merchant Vessel Capitan Constante, 790 F.2d 280 (2d Cir. 1986).

17           I note that that decision is binding precedent on this  
18 Court, even though Judge Feinberg dissented from it, which, in  
19 this Court's view, raises some questions about whether it was  
20 rightly decided. But that doesn't matter to this case.

21           Metallgesellschaft is binding authority, but it does  
22 not do what the plaintiffs say it does for this case. What it  
23 points out is that in some situations, an arbitrable tribunal  
24 may finally decide some claims and not others, and a party may  
25 seek judicial review of the claims that were finally decided.

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1 But here, no claim has been finally decided. We have a classic  
2 interlocutory order simply addressing the question of the  
3 tribunal's jurisdiction.

4 The tribunal's use of the term "final award" does not  
5 affect this conclusion. Read in context, the more significant  
6 word in what the arbitrators chose as a title is "partial."  
7 The award is only final with respect to the question of  
8 jurisdiction, which makes it not final at all. As noted by the  
9 Seventh Circuit, in any event, the caption is not what matters.  
10 "The content of the decision, not its nomenclature, determines  
11 finality." *Publicis Communication v. True North*  
12 *Communications, Incorporated*, 206 F.3d 725, at 728, (7th Cir.  
13 2000).

14 Now, today, the plaintiff suggested an alternative  
15 ground jurisdiction, however, which may make this discussion of  
16 the Michaels case somewhat moot. Plaintiff notes that it is  
17 not seeking solely the vacation of the interlocutory award of  
18 the trubinal; that what it is really seeking is an injunction  
19 against the proceeding. And as the defendant concedes, this is  
20 something that the Court does have jurisdiction to hear; that  
21 the Court's equitable powers are being invoked independently as  
22 the plaintiff could have done before the arbitration proceeding  
23 began.

24 And it appears to me that the fact that the  
25 arbitration proceeding has commenced and the arbitrators have

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1 expressed certain views about jurisdiction, does not defeat  
2 this Court's jurisdiction to hear such an action. And so the  
3 Court must address the application for a preliminary  
4 injunction, though I note that the same considerations that  
5 preclude a formal action to vacate an award in the nature of an  
6 interlocutory order also militate quite strongly against the  
7 Court exercising equitable powers to intervene in this  
8 situation. There are only so many bites of the apple that are  
9 appropriate.

10 The plaintiff could have, and I believe could have  
11 without breaching any of its obligations under the UNCITRAL  
12 rules or under the underlying contract, proceeded to court, put  
13 this issue before the Court up-front. The plaintiff will have  
14 the opportunity to put these issues before the Court at the  
15 end. If they are unsuccessful in the arbitration, and if the  
16 defendant here succeeds in obtaining any relief from the  
17 arbitration tribunal, something about which I have no view as  
18 to the likelihood, if that happens, the plaintiff can attack  
19 the award on jurisdictional, among other, grounds.

20 But to allow the plaintiff to submit the issue of  
21 jurisdiction to the arbitration tribunal, take up the time of  
22 the tribunal to decide the issue, without having come to court  
23 and presented it, and then come in medias res during the  
24 arbitration to attempt to interrupt and disrupt a scheduled  
25 arbitration hearing by, as a matter of substance, attacking the



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1 interlocutory decision with respect to arbitration, would, as  
2 the Second Circuit said, as I quoted earlier, undermine the  
3 inherent advantages of arbitration, and undermine the orderly  
4 consideration of issues by the Court. There was plenty of time  
5 to put this before a court in a way that would not delay and  
6 undermine the process of the arbitration, and allow the Court  
7 to consider it fully before the arbitration began.

8 To do it this way wastes the time of the arbitration  
9 tribunal and puts the Court under pressure to decide things too  
10 rapidly for the Court, and too slowly for the arbitration  
11 panel. So the same factors that deny jurisdiction to an  
12 explicit action to vacate the arbitrators' decision suggest  
13 that the Court should be very cautious about granting an  
14 injunction in this situation.

15 With respect to the merits of the preliminary  
16 injunction application, relying primarily on *Sphere Drake v.*  
17 *Clarendon National Insurance Company*, 263 F.3d 26 at 30 (2d  
18 Cir. 2001), Storm argues that where a party challenges the  
19 existence or formation of the contract from which the  
20 obligation to arbitrate derives, a party is entitled to have a  
21 court, rather than an arbitrator, decide the issue of the  
22 contract's existence or validity, provided that the challenging  
23 party, one, presents "some evidence" in support of its claim;  
24 and, two, unequivocally denies that an agreement was made.

25 However, *Sphere Drake's* holding that courts, as

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1     opposed to arbitrators, must decide the issue of a contract's  
2     existence in such circumstances does not purport to override  
3     the bar on interlocutory appeals from a nonfinal arbitration  
4     ruling.

5             In Sphere Drake, the dispute began in federal court,  
6     when one of the parties, Sphere Drake, brought a declaratory  
7     judgment action seeking to have certain contracts declared  
8     void, and to avoid arbitration. The other party, Clarendon,  
9     moved in court to dismiss and to compel arbitration. Neither  
10    party was contesting or appealing the ruling of an arbitrator.

11            Here, in contrast, the parties argued the issues first  
12    before the arbitration tribunal. Storm participated in those  
13    proceedings, and repeatedly conceded before the tribunal that  
14    the tribunal at least have jurisdiction to determine its own  
15    jurisdiction. See transcript of the hearing of August 14th,  
16    2006 before the arbitration tribunal at page 258, lines 7 to  
17    13; 259, lines 8 and 9; 260, lines 15 to 18; and 263, lines 6  
18    to 17.

19            This is not to say that Storm has necessarily waived  
20    or abandoned its objections to any aspect of the tribunal's  
21    rulings; however, having submitted to proceedings before the  
22    tribunal, Storm must now wait for a final award before it can  
23    ask this Court to reject the tribunal's rulings.

24            In addition to that, the question of whether the  
25    plaintiff has submitted some evidence in support of its claims

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1 raises further significant questions.

2 The plaintiff says that it has some evidence because  
3 of a Ukrainian judgment to which it refers. But in assessing  
4 whether that really is some evidence with respect to the lack  
5 of validity of the arbitration agreement, the Court needs to  
6 look more carefully, as I will in a moment, about the nature of  
7 that litigation, and what it really evidences.

8 Because there are certain narrow exceptions to the bar  
9 on interlocutory use, see, for example, Metallgesellschaft,  
10 already cited, and because the Court does have at least  
11 jurisdiction to address the injunctive relief issues, the Court  
12 must, it seems to me, go on to address the question of whether  
13 the plaintiff has made a sufficient showing of likelihood of  
14 success on the merits with respect to its underlying action.

15 Even if the Court has jurisdiction, and even  
16 disregarding the various arguments with respect to why the  
17 Court should decline to exercise that authority that I've  
18 already canvassed, it's my belief that Storm would still not be  
19 entitled to relief, because it has failed to demonstrate that  
20 it is likely to succeed in showing a basis for vacating the  
21 tribunal's interlocutory ruling or for enjoining the  
22 arbitration. Storm has, therefore, failed to demonstrate the  
23 likelihood of success on the merits or even sufficiently  
24 serious questions going to the merits of the case that such  
25 preliminary relief would be warranted. See Moore v.

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1 Consolidated Edison Company of New York, 409 F.3d 506 at 510  
2 (2d Cir. 2005) in which the Court of Appeals explained that the  
3 party seeking a preliminary injunction must demonstrate, one,  
4 irreparable harm, absent preliminary relief; and, two, either  
5 that the party is likely to succeed on the merits, or that  
6 there are sufficiently serious questions going to the merits to  
7 make them a fair ground for litigation; and that the balance of  
8 hardships tips decidedly in favor of the moving party.

9 In arguing that the tribunal's award should be  
10 vacated, Storm argues that the tribunal manifestly disregarded  
11 Ukrainian law, New York law, under recognition of foreign  
12 judgments, and the Second Circuit's decision in *Sphere Drake*.  
13 Storm also argues that the tribunal's award is contrary to  
14 public policy because it would force Storm to violate the law.  
15 None of these arguments is persuasive.

16 A party seeking to vacate an arbitration award on the  
17 basis of manifest disregard of the law must satisfy a  
18 two-pronged test, proving that, "(1) the arbitrator knew of a  
19 governing legal principle, yet refused to apply it or ignored  
20 it altogether; and (2), the law ignored by the arbitrator was  
21 well-defined, explicit, and clearly applicable to the case."  
22 *D.H. Blair & Company, Incorporated v. Gottdiener*, 462 F.3d 95  
23 at 110-111 (2d Cir. 2006), citation omitted.

24 This requires more than just an error or  
25 misunderstanding with respect to the law. As the Court of

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1 Appeals explained in *Wallace v. Buttar*, 378 F.3d 182 at 190,  
2 (2d Cir. 2004), "A federal court cannot vacate an arbitral  
3 award merely because it is convinced that the arbitration panel  
4 made the wrong call on the law. On the contrary, the award  
5 should be enforced, despite a court's disagreement with it on  
6 the merits, if there is a barely colorable justification for  
7 the outcome reached." Citations and internal quotation marks  
8 omitted.

9 With respect to *Sphere Drake*, Storm cannot meet the  
10 standard. The tribunal did not ignore or disregard *Sphere*  
11 *Drake*; but, rather, distinguished the case, noting that here,  
12 unlike in that case, "both the contract in dispute and the  
13 UNCITRAL rules clearly point to arbitration as the vehicle for  
14 resolving disputed issues." See the Partial Final Arbitration  
15 Award at 12-13. *Sphere Drake*, the tribunal noted, "did not  
16 involve an arbitration clause incorporating rules similar to  
17 the UNCITRAL rules." Same source at page 13.

18 The UNCITRAL rules to which the tribunal referred  
19 provided that the, "arbitral tribunal shall have the power to  
20 rule on the objection that it has no jurisdiction," and "shall  
21 have the power to determine the existence or the validity of  
22 the contract of which an arbitration clause forms a part." *Id.*  
23 at 12, citing Article 21 of the UNCITRAL rules.

24 Storm might believe that this attempt to distinguish  
25 *Sphere Drake* is inadequate or reflects some misunderstanding of

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1 Second Circuit law, but even if Storm were correct, that would  
2 be insufficient to vacate the tribunal's decision under the  
3 "manifest disregard" standard.

4 In any event, it is not even clear that the  
5 arbitration tribunal was bound to follow Sphere Drake in the  
6 first place. The Second Circuit rested its decision in that  
7 case on Article II(3) of the Convention on the Recognition and  
8 Enforcement of Foreign Arbitral Awards. See 263 F.3d at 29-30  
9 and note 2.

10 The article provides a rule of law for courts to apply  
11 when determining whether to grant a party's request to refer a  
12 matter to arbitration. Specifically, it provides that the  
13 "court of a contracting state, when seized of an action in a  
14 matter in respect to which the parties have made an agreement  
15 within the meaning of this article, shall, at the request of  
16 one of the parties, refer the parties to arbitration, unless it  
17 finds that the said agreement is null and void, inoperative or  
18 incapable of being performed."

19 That provision says nothing about what arbitrators  
20 should do when a party to the arbitration challenges an  
21 agreement's validity. Storm does not adequately explain why  
22 the arbitration tribunal here was required to apply a  
23 convention provision specifically directed at courts.

24 Storm also challenges the tribunal's conclusion that  
25 it was not bound by the Ukrainian court's decision,

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1 invalidating the shareholders agreement. According to Storm,  
2 the tribunal's refusal to defer to the Ukrainian court's  
3 conclusions constituted a manifest disregard of Ukrainian law,  
4 as well as New York and federal law governing the recognition  
5 of foreign judgments.

6 According to Storm, the tribunal was "required" to  
7 follow the Ukrainian orders. See Storm's brief at page 18.  
8 Storm concedes, however, that Telenor was not a party to the  
9 dispute in Ukraine, and did not even have notice of it. See  
10 the transcript of the November 15th hearing in this Court at  
11 pages 30-31.

12 The Ukrainian judgments regarding the validity of the  
13 shareholders agreement and/or the arbitration agreement,  
14 therefore, can have no binding effect on Telenor in any  
15 subsequent proceeding. It is well-established that "it is a  
16 violation of due process for a judgment to be binding on a  
17 litigant who is not a party or privy and, therefore, never had  
18 an opportunity to be heard." *Parklane Hosiery Company v.*  
19 *Shore*, 439 U.S. 322, at page 327, note 7, 1979; see also  
20 *Gramatan Home Investors Corporation v. Lopez*, 46 N.Y. 2d 481 at  
21 485-86 in 1979.

22 Thus, even if the tribunal could be said to have  
23 disregarded the Ukrainian judgments in some respect, this would  
24 not constitute the disregard of a controlling order or legal  
25 principle clearly applicable to this case, so as to satisfy the

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1 "manifest disregard" standard.

2 Moreover, there are further reasons why the Ukrainian  
3 court's judgment may not apply to this case.

4 For one thing, the parties' agreement expressly  
5 provides that New York law, rather than Ukrainian law, will  
6 control the interpretation of and validity of the parties'  
7 agreement.

8 Secondly, the arguments in this case and the arguments  
9 that were made to the Ukrainian court concern primarily the  
10 validity of the shareholders agreement.

11 Here, the issue really goes to the validity of the  
12 arbitration clause. And the arguments made with respect to the  
13 validity of the shareholders agreement do not necessarily  
14 directly attack the validity of the arbitration clause. And  
15 absent such an attack, it seems clear under New York and  
16 federal law that the arbitrators do, indeed, have jurisdiction  
17 to address that issue.

18 Plaintiffs respond that the Ukrainian courts were  
19 ultimately asked to rule on the severability -- even that's not  
20 quite the right way to put it. The Ukrainian courts were not  
21 actually asked to rule on the severability as such of the  
22 arbitration agreement, but the question was put to them whether  
23 the shareholders agreement was null and void, including the  
24 arbitration clause. And both the trial and appellate courts  
25 apparently ruled that the entire agreement was null and void.



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1           However, the relevance of that finding of invalidity  
2           is further undermined by the substantial evidence that the  
3           Ukrainian orders were the product of collusive litigation. To  
4           be called the litigation collusive is to dignify it.

5           The proceedings involved a suit brought against Storm  
6           by its own corporate parent, seeking a declaration that the  
7           general director of Storm lacked actual authority to execute  
8           the shareholders agreement with Kyivstar and Telenor. See Van  
9           Tol affirmation, paragraphs 5 and 6.

10           Kyivstar and Telenor, however, as noted already, were  
11           not parties to the litigation. And Storm, the only signatory  
12           of the agreement that was a party to the litigation, submitted  
13           no statement of defense, and was not even represented by an  
14           attorney. Storm concedes that it did not notify Telenor about  
15           the Ukrainian litigation. See the November 15th hearing  
16           transcript at 30-31. Nor did Storm advise the arbitration  
17           tribunal in New York of the existence of the Ukrainian  
18           litigation until after the Ukrainian courts have ruled on the  
19           shareholder agreement's validity, even though the arbitration  
20           proceeding, which pertains to the very same shareholders  
21           agreement that was at issue in Ukraine began before the  
22           Ukrainian litigation was filed. See Partial Final Arbitration  
23           Award at 14.

24           No argument, as far as is apparent to this Court, was  
25           ever addressed to the Ukrainian courts with respect to the

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1 severability of the arbitration clause or whether the person  
2 who signed the agreement had authority to enter an arbitration  
3 agreement. The Court was simply presented with a friendly  
4 lawsuit between, essentially, Storm and itself, in which the  
5 only argument presented was an argument for invalidity, and in  
6 which no effort was made to argue any of the issues which would  
7 certainly be apparent to an American court and which would be  
8 controlling under New York and federal law and which, for all I  
9 know, and for all the Ukrainian court's judgment would  
10 evidence, might well be significant under Ukrainian law, as  
11 well. All that was presented to the Court was one side of a  
12 part of the issues that are relevant to this case.

13 And I note finally that while this Court has had a  
14 relatively short period of time to address these issues, the  
15 arbitration tribunal, it conducted an exemplary inquiry into  
16 these issues. The arbitration tribunal did not act hastily or  
17 precipitately. It did anything but manifestly disregard the  
18 arguments presented to it with respect to Ukrainian law.

19 Rather, it conducted an extensive factual inquiry into  
20 the nature of the Ukrainian litigation, and provided a  
21 thoughtful and reasoned judgment with respect to its reasons  
22 for believing that the arbitration tribunal did have  
23 jurisdiction over this controversy, and should proceed to  
24 address its merits.

25 Finally, Storm argues that the tribunal's award should

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1 be vacated because it compels Storm to violate the Ukrainian  
2 decisions, invalidating the shareholder agreement. In making  
3 this argument, Storm relies on a provision of the convention on  
4 the recognition and enforcement of foreign arbitrable awards  
5 that allows a court to refuse enforcement of an award, where to  
6 do so would violate the public policy of the enforcing state.  
7 See Convention Article V(2)(B).

8 According to Storm, it would violate public policy to  
9 compel violation of a foreign decree. The Second Circuit has  
10 held, however, that the "public policy exception is to be  
11 construed very narrowly, and should be applied only where  
12 enforcement would violate our most basic notions of morality  
13 and justice." *Europcar Italia, S.p.A. v. Maiellano Tours,*  
14 *Incorporated*, 156 F.3d 310 at 315 (2d Cir. 1998) omitting  
15 citations and internal quotation marks.

16 In view of Storm's conscious decision not to inform  
17 the other parties to the shareholders agreement that their  
18 agreement's validity was at issue in Ukrainian litigation, it  
19 cannot now rely on "basic notions of morality and justice" to  
20 argue that that litigation binds the uninformed parties. To  
21 the extent Storm faces a dilemma of conflicting obligations,  
22 the dilemma results from Storm's and its parent's own tactical  
23 decisions.

24 Moreover, I note that the convention referred to  
25 relates to whether a court to enforce an award that would

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1 violate public policy of the enforcing state.

2           There's no issue here, it seems to me, that the public  
3 policy of any state would be violated by requiring the parties  
4 to proceed with respect to the arbitration. There might be  
5 issues at some future point, depending on what Ukrainian law  
6 really is or would really be found to be in a  
7 properly-contested litigation in that country.

8           There may be some issue as to whether under Ukrainian  
9 law an award of the arbitration tribunal could be reduced to  
10 judgment and enforced, but that would be a matter for the  
11 Ukrainian courts. I see nothing in American or New York public  
12 policy that would prevent requiring the parties here to proceed  
13 with their arbitration.

14           For these reasons, the Court believes, first, that the  
15 plaintiff has definitely not succeeded in showing a likelihood  
16 of success on the merits. And, indeed, it's my belief that  
17 Storm has not shown sufficiently serious questions going to the  
18 merits to make this Court proceed further with applying the  
19 preliminary injunction test.

20           However, even if I'm wrong about that, and even if  
21 Storm has shown sufficiently serious questions going to the  
22 merits to make them a fairground for litigation, Storm cannot  
23 show that the balance of hardships tips decidedly in its favor.  
24 And I emphasize the test is decidedly and not slightly.

25           Both parties may suffer hardships from a ruling

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1 against them.

2 If the Court rules for Telenor, Storm will be forced  
3 to participate in arbitration, in which it claims it has no  
4 obligation to participate, and which, at the end of the day, it  
5 will be entitled to challenge on these jurisdictional grounds  
6 in an action either by it to vacate or by Telenor to enforce an  
7 award, assuming any final award were offered.

8 I note, however, that while the courts have indicated  
9 that being forced to participate in an arbitration improperly  
10 constitutes irreparable injury, that's a somewhat theoretical  
11 statement, especially in the context of a case like this one.

12 Storm is not a party that has never agreed to proceed  
13 to arbitration, and is somehow being required to do so. Storm  
14 is a party that has explicitly agreed to participate in  
15 arbitration which is challenging the validity of that  
16 agreement.

17 As a practical matter, the harm to it of proceeding  
18 with the arbitration is somewhat limited. The arbitration is  
19 scheduled for a rather brief period. The parties have already  
20 expended considerable resources in this matter on two  
21 continents in two court systems and before the arbitration  
22 panel. And the actual harm of going forward at this point with  
23 a hearing on the merits is somewhat limited.

24 On the other hand, if the Court rules for Storm, then  
25 Storm will be able to prolong its boycott of the meetings of

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1 Telenor's subsidiary, Kyivstar, which makes it apparently  
2 impossible for that company to function, and Storm will be  
3 permitted to continue with its policy of dragging out these  
4 proceedings through various delay tactics. It may be a close  
5 call which hardship, if the Court were in error, is greater,  
6 but it certainly does not seem to me that the balance of  
7 hardships tips decidedly in favor of Storm.

8           Indeed, overall, what appears to me to be the case is  
9 that the plaintiff, Storm, and its parent, have attempted, by  
10 means of friendly litigation in the Ukrainian courts, without  
11 notice to the other parties to the dispute in this case, to  
12 make an end run around the very procedure for adjudicating  
13 disputes between the parties that Storm and Telenor  
14 deliberately agreed to when they entered their contract; and  
15 that this effort should not be countenance by this Court.

16           Regardless of the ultimate merits of the question of  
17 whether the arbitration panel does have jurisdiction, and  
18 whether the shareholders agreement or the arbitration clause  
19 within it will ultimately be found to be valid by this or other  
20 courts in the United States, the effort by the plaintiffs here  
21 to attack the arbitration tribunal and its jurisdiction on the  
22 basis of the Ukrainian litigation, and again, I say nothing  
23 about whether the Ukrainian court or the arbitration tribunal  
24 may or may not ultimately be right about the validity of any of  
25 these contracts or clauses, but the effort to disrupt the

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1 arbitration proceeding on the basis of collusive litigation in  
2 the Ukraine is basically a shabby tactic on the part of the  
3 plaintiffs and should not be condoned.

4 In sum, the Court holds that it may not review the  
5 arbitration tribunal's partial final award regarding  
6 jurisdiction, but also that to the extent that the Court has  
7 jurisdiction, either on that theory or as based on the  
8 independent action invoking the equitable powers of the court  
9 to enjoin the arbitration, there is no basis for vacating the  
10 award.

11 At a minimum, plaintiffs have not made a showing of  
12 likelihood of success on the merits or serious questions going  
13 to the merits and a balance of hardships in its favor that  
14 would warrant preliminary relief, and the application for a  
15 preliminary injunction is therefore denied.

16 Now, at some point I guess we'll decide whether this  
17 action continues to exist in some form or whether it's properly  
18 dismissed without prejudice to some further action with respect  
19 to the validity of any award that the arbitration panel might  
20 or might not come up with, but this is not the day to worry  
21 about that. And I suppose the plaintiff has its avenues of  
22 review of this decision, and will either pursue them or not, as  
23 the case may be.

24 But I think that does all the business that brings us  
25 here on the morning before Thanksgiving. Unless there's



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1 anything that the parties need me to address further, I think  
2 we can stand adjourned. Mr. Van Tol.

3 MR. VAN TOL: Your Honor, I understand that it is on  
4 the eve of Thanksgiving. But if I may have, at most, three  
5 minutes to make an offer of proof on one piece of evidence and  
6 then a couple arguments to make sure any appellate record is  
7 clear that I haven't waived the arguments. I will be brief.

8 THE COURT: Okay.

9 MR. VAN TOL: The first thing, your Honor, I'd like to  
10 hand up to the Court is a copy of the Kyivstar financials. And  
11 I'd ask the Court to take judicial notice of those financials.  
12 They were pulled off the web site for Kyivstar, and they show  
13 that in 2006, things looked better at Kyivstar than they were  
14 in 2004 and 2005. So that any claims of financial harm by  
15 Telenor should not be credited.

16 That's all I wanted to say about that, your Honor.

17 THE COURT: Right. Well, let me say, I've not  
18 understood this to be a question of direct dollars and cents.  
19 What I understand the argument to be on the part of the  
20 defendant is that its ability to function as a corporation is  
21 inhibited. Now, that may or may not show up in the bottom line  
22 in the short run.

23 But it's not been my belief that the defendants have  
24 argued irreparable harm or dollars and cents harm in the short  
25 run as a result of some financial loss; but, rather, that its



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1 ability to properly function as a corporation is harmed.

2 But I take it, Mr. Sills, you don't deny that these  
3 are the numbers?

4 MR. SILLS: Well, your Honor, I don't represent  
5 Kyivstar, but I --

6 THE COURT: Oh, okay.

7 MR. SILLS: They are what they are. The company is  
8 operating; does, I believe, have an operating profit. I don't  
9 have any reason to doubt these numbers, although I can't vouch  
10 for them either.

11 THE COURT: They are what they are. This document can  
12 be marked as Plaintiff's Exhibit 1 of this date, and it's part  
13 of the record.

14 MR. VAN TOL: Thank you, your Honor. Just so it's  
15 clear, I'm not trying to waste anyone's time. On page 26 of  
16 Telenor's brief, they do say that Storm's actions are causing  
17 financial harm. That was my sole reason for reading that.

18 THE COURT: I don't think it's a waste of time.

19 MR. VAN TOL: Quickly, your Honor --

20 THE COURT: And, again, financial harm. Financial  
21 harm doesn't necessarily mean a loss. You could be making  
22 money, but you could be making more money. The numbers are  
23 what they are.

24 MR. VAN TOL: Thank you, your Honor. And just so the  
25 record is clear on what our arguments are, Mr. Sills, in his

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1 brief, raised Parklane Hosiery and some other collateral  
2 estoppel cases. And I noted them in your Honor's ruling.

3 Just to be clear, Storm is not arguing collateral  
4 estoppel. We didn't below; we're not here. We're relying on  
5 cases like Sea Dragon, which are not collateral estoppel cases,  
6 but say there's a ruling before it needs to be recognized.

7 And my last point or next-to-last point is on Sea  
8 Dragon, quickly, that case said an allegation of collusion is  
9 not enough. In order for there to be a judgment that's not  
10 recognized, there must be a showing of fraud, and we would  
11 submit that that was not the case here.

12 Moreover, Sea Dragon was just like this case in that  
13 the party there got notice after the fact, could have  
14 intervened in the Dutch proceedings to do something, and  
15 didn't. We submit that Telenor Mobile is in exactly that  
16 situation.

17 Last point, your Honor, is on the alleged collusive  
18 nature of the Ukrainian actions, I note that Storm did appeal.  
19 We submitted expert evidence that the defense put on by Storm  
20 was not unusual from a Ukrainian point of view. And in both  
21 the court below and on the appellate level, Storm  
22 representative mentioned and brought up the fact that there was  
23 a New York arbitration going on, asked the Ukrainian court to  
24 defer in favor of arbitration; in other words, the same  
25 argument Telenor Mobile is making here.

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1 And thank you, your Honor. That's all I have.

2 THE COURT: Okay. Mr. Sills, I don't think you need  
3 to say anything. If you think you do, I should give you the  
4 chance.

5 MR. SILLS: I don't, your Honor. I think this is all  
6 amply covered in the record.

7 THE COURT: All right. Then I think we're done. I  
8 thank you all for being here, and for a very illuminating  
9 argument.

10 I must say, finally, perhaps I said it in the ruling  
11 that I already made, that in using rather strong language with  
12 respect to what I think Storm is up to here, I did not for a  
13 moment mean, and I do not mean to cast any aspersion whatever  
14 on the conduct of counsel.

15 I think that plaintiff's counsel have made legitimate  
16 arguments in this Court with respect to them the best they  
17 could with respect to what their client's interests are. And I  
18 don't believe that counsel has been anything less than  
19 professional and candid with the Court.

20 But I do believe that the overall strategy here being  
21 pursued by the plaintiff is one that is a strategy of a delay  
22 and evasion of the arbitration proceedings, and it's not  
23 something that I have been persuaded is legitimate or is a  
24 basis for interfering with the arbitration panel at this time.

25 But I want to make very clear that I have no -- I

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Argument

1 intend no criticism of counsel. I don't believe any criticism  
2 of counsel would be justified.

3 All right. Thank you very much.

4 MR. VAN TOL: Thank you, your Honor.

5 MR. SILLS: Thank you, Judge.

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